9, citing Cal. Family Code § 150, formerly Civil Code § 4390(h). But former § 4390 was not enacted until 1990, and the reference to § 11350 was added in 1992 -- long after the 1983 and 1985 assignments in this case. Cal. Stats. 1991, Chap. 110, § 5; Stats. 1989, Chap. 1359, § 1.

Fourth, the county and an *amicus curiae* (D.A. Cline) make unsupported and unfair disparaging references.[2] The county persists with that approach even though it previously acknowledged, "we do not claim or suggest that Mr. Visness' family fraudulently obtained AFDC," Appellant's Reply Brief at 13.

The record contains no hint of fraud or evasion. The county simply sat on its rights until September 1987, when the three-year statute of limitations already was expiring on benefits that began in March 1983. See Excerpts of Record 1A, 3A.

After the county finally established the support obligation, Mr. Visness has in fact paid the current monthly support. By delaying, however, the county caused an overwhelming retroactive liability that is beyond his limited ability to pay. Mr. Visness quite properly seeks refuge in

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[2] The county says, for example, it "eventually found" Mr. Visness, Pet. at 4; the ruling abets and encourages "welfare fraud and misuse of the bankruptcy remedy," *id.* at 5, 20; "absent parent who succeeds in keeping his whereabouts officially unknown," *id.* at 8; "finally found, he may escape his ... moral reimbursement duty by declaring bankruptcy," *id.* at 8. The *amicus* similarly asserts that an "absent parent who avoids service of process and delays ... is rewarded." *Amicus* (D.A. Cline) at 6 (emphasis omitted).

bankruptcy.

Finally, another *amicus curiae* (D.A. Smith) represents that "such parents" owe nearly five billion dollars in assigned support obligations and "by extrapolation" 11% of that sum is from § 11350 judgments "and consequently at risk of discharge in the Ninth Circuit." *Amicus* (D.A. Smith) at 2-5 & App. See also Pet. at 7, 20 (claiming that the decision causes "extreme financial harm to counties" [caps. omitted]).

The assertions have no evidentiary foundation. *Amicus* neither requests judicial notice nor cites any publication or report. Indeed, he acknowledges "California does not keep statistics" on judgments under § 11350. *Amicus* (D.A. Smith) at 4.

The unsupported "extrapolation" of such judgments is particularly misleading. Even assuming *arguendo* that the figures on § 11350 judgments are as claimed, they would lack relevance to this case. An unknown but probably large portion of such judgments involve debts that accrued after support was established by agreement or court order -- and which are *not at issue* in this case.

More to the point, whatever the actual retroactive debt may be, it is largely within the counties' own power to control. If they would promptly establish prospective support obligations under § 11350, the "retroactive" amounts that are "at risk of discharge" would be greatly reduced, if not eliminated altogether in the vast majority of cases.

REASONS FOR DENYING THE WRIT

I.

No Conflict Justifies Supreme Court Review

The county presents this case as perpetuating a conflict with the Seventh Circuit's decision in *In re Stovall*, 721 F.2d 1133 (7th Cir. 1983), App. at 56-60.

There was no conflict on the same issue during the October 1986 Term, when the Court denied certiorari in *In re Ramirez*, *supra*, 795 F.2d 1494, *cert. denied*, 481 U.S. 1003. And the county cites no authority for any more compelling claim in the intervening years.

In *Stovall* the aid began in 1974, and child support was established by a divorce decree in 1975. The father accumulated an arrearage "under the child support order" before filing for bankruptcy in 1982. App. at 56-57, 795 F.2d at 1344. In the Seventh Circuit's words,

> Appellant contends that this language [§ 602(a)(26)] refers only to the actual moneys that ... have accrued at the time of the assignment. Thus, in his view, all that is assigned pursuant to this statute are those sums *which are in arrears* at the time the aid recipient makes an assignment to the state agency.

App. at 58, 721 F.2d at 1135 (emphasis added).

The *Stovall* court rejected that view and concluded that "the full amount owed to the state pursuant to such an assignment is not dischargeable in bankruptcy." *Id.* But there is no suggestion in *Stovall* that the amount "owed" was other than the "arrearage ... under the child support order."

The county's petition nevertheless asserts: "Both cases expressly conflict with *In re Stovall*, 721 F.2d 1133 (7th Cir. 1983.)" Pet. at 7. The opinion below does not even mention *Stovall*. And in *Ramirez*, the Ninth Circuit confronted the supposed "conflict" and explained that none exists:

> The critical issue ... was whether Mr. Stovall would have to pay just the arrearage in support at the time of the assignment or also those support payments which accrued after assignment.... [O]n the facts of that case, the arrearage due at the time of assignment ... was arrearage accumulated "under the child support order."

In re Ramirez, 795 F.2d at 1498; but see *id.* at 1501 (dissent viewing *Stovall* as "addressing the same issue" and in "conflict").

The Seventh Circuit did not consider whether the discharge exemption encompasses reimbursement of benefits paid before any support obligation was established by agreement or court order. That is the issue before the Court in this case.

The county boldly re-writes *Stovall* to create a stronger illusion of a conflict. Yet nothing in that decision supports the county's representations that Mr. Stovall "conceded ... that the post-order arrearages were not dischargeable" and that "he sought discharge of the AFDC reimbursement amount accrued before the 1975 court order for support," Pet. at 7. To the contrary, he plainly contested the arrearages "under the support order"; and the decision does not indicate whether the state's claim included the pre-divorce benefits. See generally, App. at 56-58, 721 F.2d at 1134-1135.

The issue today is essentially the same as when this Court denied certiorari in 1987.[3] Respondent respectfully submits that there is no conflict, and this petition similarly should be denied.

II.

The Court of Appeals Correctly Holds That Retroactive Reimbursement Of AFDC Benefits Is Dischargeable

The Ninth Circuit correctly held that a retroactive judgment under § 11350 is dischargeable. Such debts are neither owed "to" the spouse or children nor assigned by them to the county. As the Ninth Circuit concluded,

> Because Mr. Ramirez's debt to the County arose from the operation of this statute and not from any right assigned by Mrs. Ramirez, the debt falls outside the scope of § 602(a)(26) and therefore is not subject to the nondischargeability provision of § 656(b).

795 F.2d at 1498; accord, *In re Visness*, App. at 37-38, 57 F.3d at 781.

The holding and reasoning are based squarely upon the language of the federal statutes. 11 U.S.C. § 523(a)(5) only exempts debts that are "to" the spouse or child for support "in connection with" an agreement or court order, as well as

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[3] *In re Stovall* was decided without oral argument; and no petition for certiorari was filed. In the ensuing 12 years, Shephard's Citations shows only two court of appeals decisions citing the case -- *Ramirez* and *In re Seibert*, 914 F.2d 102, 104 (7th Cir. 1990). In *Seibert*, a "county waived its right to collect past due child support ...." That case did hold that pregnancy and medical expenses and court costs in paternity actions are not discharged. Although such expenses arguably have similarities to retroactive support, the county has not asserted a conflict on any basis other than *Stovall*.

"such debts" when they are assigned pursuant to 42 U.S.C. § 602(a)(26). The rights that are assigned under § 602, in turn, are only those "rights to support ... which have accrued at the time such assignment is executed." See App. at 61, 63.

The county would disregard § 523(a)(5)'s limitations. It interprets "accrued at the time such assignment is executed" as broadly encompassing all rights to support "from birth" -- regardless of whether any obligation had been established by agreement or court order at the time of execution.

But that all-inclusive interpretation would render the term "accrued" superfluous, and the phrase "at the time such assignment is executed" would be meaningless. As the district court observed in this case, the county's position "would mean that "every AFDC/Bankruptcy case would result in a nondischargeable debt," which the court considered an unduly "drastic step." App. at 54.

This Court rejected a similar argument in *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552 (1990), which held that criminal restitution orders are dischargeable under Chapter 13. After noting that the analysis begins with the literal language of the statute, the Court expressed "a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." 495 U.S. at 557-558, 562.

Under similar principles of construction, construing "accrued at the time such assignment is executed" as meaning

"from birth" is not likely to reflect Congress' intent.

A more logical approach would harmonize the interrelated provisions of the Bankruptcy Code and Social Security Act. Both 11 U.S.C. § 523(a)(5) and 42 U.S.C. § 656(b) limit the county's exemption to debts which were "assigned" pursuant to § 602(a)(26). The reference to "accrued" rights in § 602, then, would refer to those established rights that are within § 523(a)(5). That is, "accrued" rights are those for support "in connection with" an agreement or court order.

No countervailing justification appears for the assertion that "accrued at the time such assignment is executed" includes a retroactive judgment for earlier benefits.

As noted above, under California law, there is no right to "retroactive" support. *Crider v. Superior Court, supra*, 15 Cal.App.4th at 232-234; *In re Marriage of Goosmann, supra*, 26 Cal.App.4th at 844. And the county, as assignee, acquires no greater rights than were possessed by the assignor. *In re Marriage of Smith, supra*, 209 Cal.App.3d at 203-204.

The Court of Appeals correctly held, then, that the county's retroactive judgment was derived solely from § 11350, and consequently is not within the statutory exemption from discharge. *In re Ramirez*, 795 F.2d at 1498.[4]

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[4] The Ninth Circuit "assumed without deciding," that a § 11350 reimbursement order could be an "order of a court" within the meaning of § 523(a)(5). App. at 37, 57 F.3d at 780. But § 11350 establishes a debt "to the county," not "to a spouse, former spouse or child" -- which is the type of debt that must be "in connection with" such an agreement or order under § 523(a)(5).

On the other hand, should this Court grant certiorari, respondent respectfully submits that an appropriate resolution would affirm the principle that retroactive judgments for AFDC prior to establishing the support obligation by agreement or court order are not exempt from discharge.

The Court may wish, for example, to make it clear that further amendments to state law will not change the result. See, e.g., *Citizens Bank of Maryland v. Strumpf*, ___ U.S. ___, 116 S.Ct. 286, 289 (Oct. 31, 1995) (federal, not state law governs construction of the bankruptcy laws). It is the literal language of the federal statutes, not the peculiarities of state law, that makes these retroactive judgments dischargeable.

III.

The Policies And Equities Support Discharge Of The Retroactive Debt

The decisions allowing discharge are not only correct; they are the proper result based upon public policy and equity.

This Court has a "longstanding tradition of reading the Bankruptcy act with an eye to its fundamental purpose -- the rehabilitation of bankrupts. This has [nearly] always led the Court ... to construe narrowly any exceptions to the general discharge provisions. *United States v. Sotelo*, 436 U.S. 268, 285-286 (1978) (Rhenquist, C.J., dissenting for 4 justices), citing *Gleason v. Thaw*, 236 U.S. 558, 562 (1915).

The principle and underlying policy of rehabilitation are

fully applicable here.

Until the support obligation is established by judgment, order or agreement, a number of pertinent issues remain uncertain. They include *inter alia* paternity, ability to pay, and the amount of support.

Where no support obligation is established at the time of assignment, the county should be encouraged to take that step promptly. Everybody benefits when the fact and the amount of a prospective obligation are quickly established. The noncustodial parent can manage realistic monthly payments, or alternatively, the county may garnish wages or take other action to limit any arrearage.

By contrast, when the county sits on its rights during the three-year limitations period, the result often will be precisely what occurred here. The multi-year retroactive judgment is overwhelming for the parent. It leaves little alternative to bankruptcy. See also *Ramirez*, 795 F.2d at 1499 ("mindful of the centrality of equitable concerns in all bankruptcy decisions," the "overriding goal is to leave Mr. Ramirez in a position to meet his current obligations to support his children").

And contrary to the county's allusion, a properly sought refuge in bankruptcy violates no "moral duty," Pet. at 8.

The opinion below, as did *Ramirez*, serves an important function by informing prosecutors that delays in establishing support rights carry the risk of discharge in bankruptcy.

The county and its *amici* appear oblivious to the practical and human consequences of their delay in establishing the support obligation. They argue instead that exemption from discharge is necessary to combat "welfare fraud" and bankruptcy "abuse." Pet. at 5, 20; *Amicus* at 4-6; see also n. 2, *supra*. But as noted *supra*, there is no evidentiary support for such claims in this case.

Had there truly been any fraud, the state could have prevented discharge on that basis under § 523(a)(2)(A). *Field v. Mans*, ___ U.S. ___, 116 S.Ct. 437, 440-441 (Nov. 28, 1995). And if criminal conduct were involved, the state could have secured a restitution order as a condition of probation. In this proceeding under Chapter 7, such a restitution order would be exempt under § 523(a)(7). *Kelly v. Robinson*, 479 U.S. 36, 50 (1986); compare *Davenport, supra*, 495 U.S. at 555 (holding restitution orders are dischargeable under the different language governing Chapter 13).

Even if a parent evades location or service, the county may file immediately and utilize a number of investigative and procedural weapons to minimize any need for retroactive relief. See, e.g., *Ramirez*, 795 F.2d at 1495 (judgment by default after noncustodial spouse failed to appear).[5]

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[5] *Amicus* Smith asserts that an action must be filed within 45 days of "locating" the parent, and appears to suggest that earlier filing is improper or wasteful. *Amicus* at 6 n. 7, citing 45 C.F.R. § 303.5(a)(1). But the cited regulation merely says the agency must "[p]rovide an absent father the opportunity to voluntarily acknowledge paternity ...." It neither restricts nor delays the agency's options.

Prosecutors of such cases, at least in California, tend to be specialists wielding the full power of the state. By contrast, the parents of AFDC recipients often lack legal representation or the ability otherwise to assert available defenses. As in this case, a parent may stipulate to the full amount demanded, regardless of whether he or she would have been able or ordered to pay, that level of support.[6]

Because the county is likely to garnish wages, moreover, the noncustodial spouse may be unable to meet current obligations and therefore seek refuge in bankruptcy. Having caused that very result, the county is in a poor equitable position to assert that its retroactive debt cannot be discharged.

Finally, we note the arguments of the two *amici curiae*. The brief by District Attorney Smith (from San Francisco) asserts huge sums that are unsupported by the record; it does not even suggest a basis for judicial notice. *Amicus* at 3-5. Even assuming *arguendo* that the numbers had evidentiary value, they are meaningless in the context of this case. To be relevant, the statistics must state amounts that are at issue -- the "retroactive" debt for payments made before any agreement or order. *Amicus* makes no attempt to provide such

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[6] An irregularity in this case illustrates the potential for prosecutors taking unfair advantage. The county acknowledges a three-year statute of limitations. Pet. at 11 n. 5. Yet it secured a "stipulated order" for reimbursement of AFDC beginning September 1, 1984 -- more than three years prior to the complaint filed September 16, 1987. Excerpts of Record 2A, 2B.

figures.

Most importantly, however, any financial consequences from Court of Appeals' rule are largely within the counties' own control.

The *amicus curiae* brief by District Attorney Cline (from Tulare County) largely copies the Smith brief. Its only new substance is a quotation from Justice O'Connor's concurring opinion in *Rose v. Rose*, 481 U.S. 619, 637-638 (1987) (discussing nondischargeability of true support debts).

But that excerpt supports our position. Justice O'Connor speaks of a duty to support one's spouse and children, "'a decree awarding alimony'" and enforcement "'by means of legal proceedings.'" The language does not suggest that the same policies would exempt a debt to the county, where no support duty had been established by agreement, decree or other legal proceedings.

An established obligation to a spouse or child simply cannot be compared with a retroactive debt to a county. Mr. Visness has paid and intends to continue paying the current monthly support amounts. They are not at issue here.

In any event, the counties' pleas of bad policy and financial hardship are unavailing. In *Davenport*, the Court "refus[ed] to carve out a broad judicial exception to discharge ...." 495 at 563. While recognizing that discharges may hamper state criminal judges and create burdens for state prosecutors, the Court concluded:

> Nonetheless, the concerns ... cannot justify rewriting the Code to avoid federal intrusion. Where, as here, congressional intent is clear, our sole function is to enforce the statute according to its terms.

Id.

Similarly, even if the county's complaints could be persuasive, they would not justify a judicial exception to discharge or rewriting the Bankruptcy Code.

IV.

Certiorari Is Inappropriate When The Petition Hinges On Claims That State Decisions On State Law Are "Wrong"

Review on certiorari would be inappropriate for another reason. The county argues that a recent California appellate decision interpreting § 11350 should be disregarded by this Court. Specifically, *Crider v. Superior Court, supra*, 15 Cal.App.4th 227 is "a classic example of bad facts making wrong law." Pet. at 13-15 (also criticizing the state court as having "misstated" California law).

The argument is at best curious. In *Crider*, the same team of specialists from the California Attorney General's office was opposed by a father who appeared *in propria persona*. With the field virtually to themselves, they not only were unable to avert the supposedly "wrong law"; they also failed to correct the "error" on a petition for rehearing -- and on a petition for review by the California Supreme Court as well.

Respondent respectfully submits that certiorari is

inappropriate when the petition depends upon this Court concluding that the state's own appellate decisions are "wrong" on the underlying state law.

CONCLUSION

Respondent Dale Visness respectfully submits that the petition for writ of certiorari should be denied. Alternatively, respondent requests that the Court clarify the applicable federal principles and affirm the judgment of the Court of Appeal that the retroactive judgments in this case are dischargeable in bankruptcy.

Date: December 26, 1995

Respectfully submitted,

Gary S. Garfinkle
Shian MacLean
GARY S. GARFINKLE

Gary Garfinkle
Counsel of Record

Counsel for Respondent